

## APPENDIX

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IN THE  
**Supreme Court of the United States**

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OCTOBER TERM, 1971

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No. 732

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MERLE R. SCHNECKLOTH, Superintendent, California  
Conservation Center, *Petitioner*

VS.

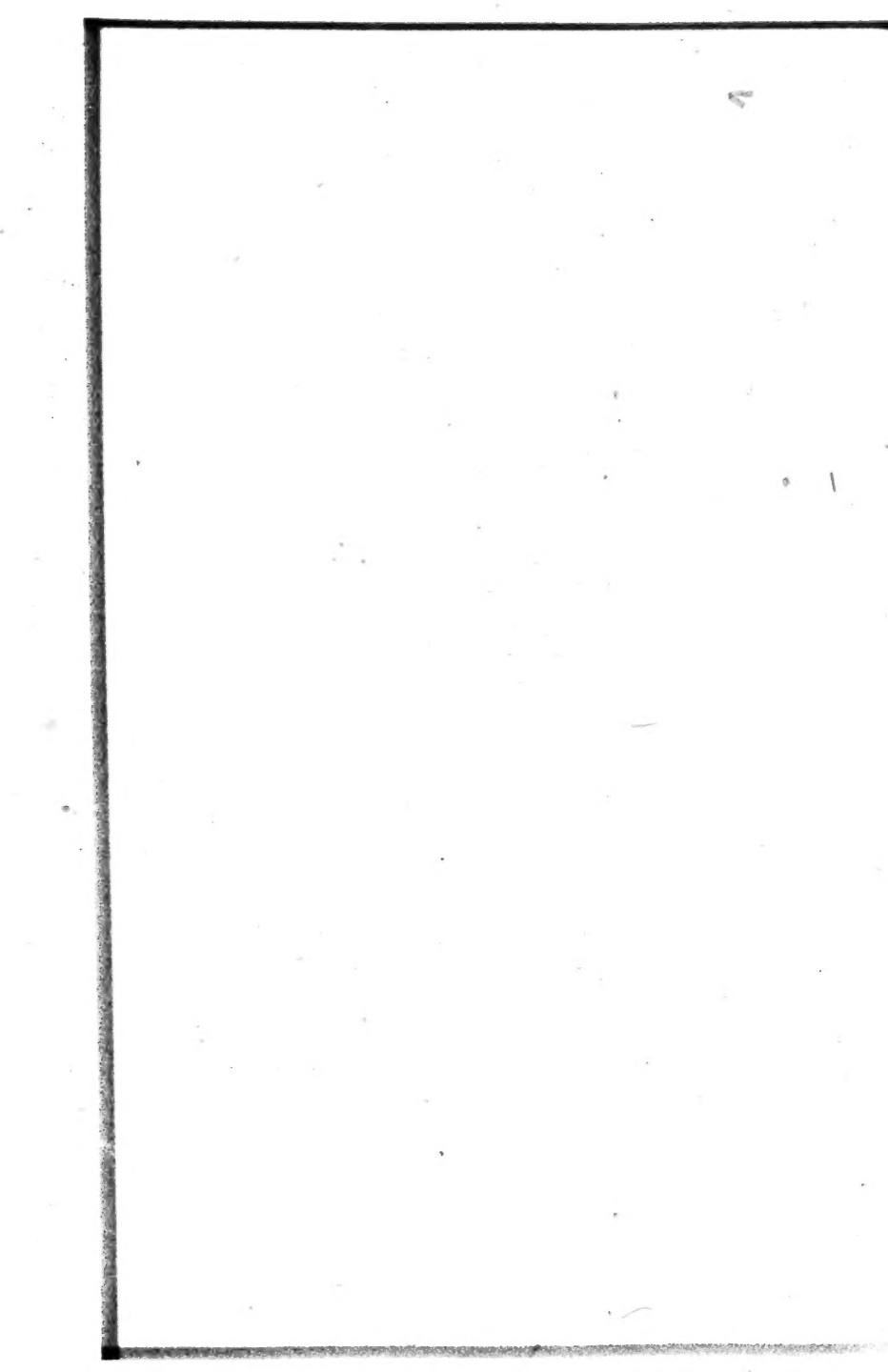
ROBERT CLYDE BUSTAMONTE, *Respondent*

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On Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit

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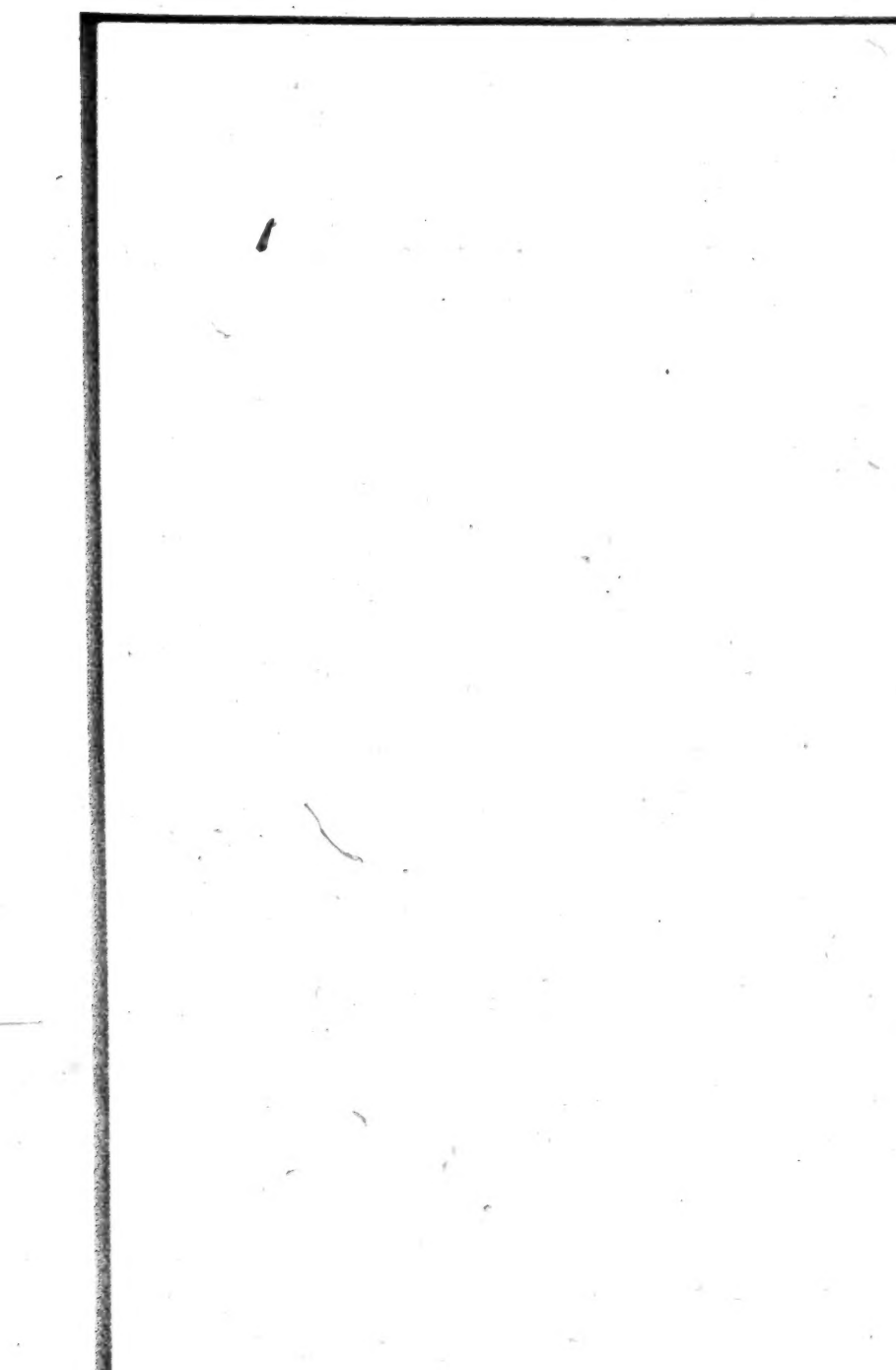
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**Appendix A**

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**DOCKET ENTRIES  
CIVIL DOCKET  
UNITED STATES DISTRICT COURT**

C-70-303

AJZ

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**ROBERT BUSTAMONTE**

vs.

**MERLE R. SCHNECKLOTH**

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For Plaintiff: In Pro Per B-8435, Tamal, Calif.  
Stuart P. Tobisman, 611 West 6th St., Suite 3800,  
Los Angeles, Ca 90017

For Defendant: Attorney General State of Calif.,  
6000 State Bldg., S.F., Ca

**STATISTICAL RECORD**

J.S. 5 mailed 2-10-70

J.S. 6 mailed Feb. 13, 1970

Basis of Action: Petn. for Writ of Habeas Corpus

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**Robert Clyde Bustamonte**

vs.

**Merle R. Schneckloth****Proceedings**

1970

Feb. 10—Petitioner allowed to process in Forma Pau-  
peris (Zirpoli).

Feb. 10—1. Filed Petition for Writ of Habeas Cor-  
pus.

- Feb. 10—2. Filed motion by petitioner to Amend petition for Writ of H.C.
- Feb. 10—3. Filed Xerox Copy of State Appellate Court opinion.
- Feb. 10—4. Filed Order denying petition for Writ of Habeas Corpus.
- Feb. 10—Copy mailed to AG and Petitioner.
- Feb. 17—5. Filed petnr's. notice of change of address and mo. to change title of respondent (To Zirpoli).
- Mar. 9—6. Filed Notice of appeal by petitioner.
- Mar. 10—Mailed Clerk's notice of filing appeal.
- Mar. 9—7. Filed Certificate of Probable Cause to Appeal and Order allowing petitioner to proceed on appeal without prepayment of cost. (Zirpoli).
- Apr. 8.—Made, Mailed Record on Appeal CCA.
- Apr. 22—8. Filed receipt from USCA, 9th Cir., for record on appeal, #25678.

UNITED STATES COURT OF APPEALS  
For The Ninth Circuit

No. 25678

D. C. No. C-70-303

D. C. Judge Zirpoli

Notice of appeal filed Mar. 9, 1970.

448 Fed. Rep. 2nd P 699.

Civil-HC

DC , Northern California

See Misc # 4987

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ROBERT BUSTAMONTE

Plaintiff-Appellant

vs.

MERLE R. SCHNECKLOTH, SUPT

Defendant-Appellee

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For Appellant: Stuart P. Tobisman, Esq.

For Appellee: Calif. Atty. Genl., S.F.

Date: 1970—Apr. 9.

Appellant's Account—FP

1970

Apr. 9—Filed Cert. Transc. of Record on Appeal in  
I Vol., Pleadings—(FP)

Orig. and 3 copies.

Docketed Cause and Entered Appearances of  
Counsel.

Apr. 21—Loaned copy of i volume record to appellant  
counsel Tobisman. brief due June 1, 1970.

(retd. record 9/16/70).

Jun. 1, 1970—Filed 4 Appellants Briefs.

Jul. 10, 1970—Filed Motion and Order (C) Extending Time to file appellee's brief to August 1, 1970.

Aug. 5, 1970—Filed Motion and Order (C) Extending Time to file appellee's brief to August 31, 1970.

Aug. 12—Loaned to Atty. Gen. copy of (1) vol. (Ret. 8/31/70) record (to be rtd. with brief).

Aug. 31, 1970.

Sept. 4—Rev'd. from State Atty. Genl. copy of 2 vol. State ct. Transc., in LPS\*\*\*\*

Sep. 16, 1970—Filed 4 Appellee's Reply Briefs—Calendared 7/8 S.F.

1971

June 2—Recvd. appellee letter of 6/1 re add'l. authorities (Hm. M. E.).

July 8—Argued and Submitted (HM, M, E).

Sept. 13—Ordered Opinion (Merrill) Filed and Judg. to be Filed and Entd.

Sept. 13—Filed opinion—DC order denying writ is vacated and matter remanded to DC.

Sept. 13—Filed and Entered Judgment.

October 1, 1971—Filed orig. and 3 appellee's application for Stay of Mandate to M.

October 7, 1971—Filed application and order (M) granting Stay of Mandate to November 1, 1971.

Nov. 2, 1971—Filed orig. and 3 appellee's further application for Stay to M.

Nov. 4, 1971—Filed application and order (M) granting Stay of Mandate to December 1, 1971.



- Dec. 1, 1971—Filed orig. and 3 appellee's application for Stay of Mandate to M.
- Dec. 3, 1971—Filed application and order (M) granting Stay of Mandate pending the filing for writ of certiorari to Supreme Court.
- Dec. 8—Recvd. SC notice re: filing pet. for cert. (12/3/71) SC #71-732
- Mar. 7, 1972—State Court Transcripts returned to Attorney General (picked up by messenger)  
Received receipt for State Court Transcripts.
- Mar. 10—Filed cert. copy of SC order granting pet. for cert. (HM, M, E).
- Mar. 13—Issued certified copy of record to Clk., SC, for cert. ht.
- Mar. 20—Received Receipt for [sic]

**Appendix B**

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**United States Court of Appeals  
for the Ninth Circuit**

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Robert Bustamonte,  
Plaintiff-Appellant,

vs.

Merle R. Schneckloth, Superintendent,  
California Conservation Center,  
Defendant-Appellee.

} No. 25,678

[September 13, 1971]

On Appeal from the United States District Court  
for the Northern District of California

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Before: HAMLIN, MERRILL and ELY, Circuit  
Judges

MERRILL, Circuit Judge:

This appeal is taken from an order of the District Court denying without hearing appellant's petition for a writ of habeas corpus.

On April 21, 1967, appellant was convicted in the California Superior Court for Santa Clara County of a violation of California Penal Code §475(a): possession of a completed check with intent to defraud. Judgment was affirmed on appeal to the California

District Court of Appeal. *People v. Bustamonte*, 270 Cal.App.2d 648 (1969). Hearing was denied by the State Supreme Court.

In his petition for habeas corpus Bustamonte asserts that his state conviction resulted from a refusal of the state trial court to suppress evidence obtained as the result of an unlawful search and seizure.

In January, 1967, the proprietor of a carwash in Mountain View discovered that his business office had been broken into and that a check protector and a number of blank checks had been stolen. Later that month a Ford car with six occupants, one of whom was appellant, was stopped by a Sunnyvale police officer at approximately 2:40 A.M. The officer had noticed that a headlight and the license-plate light were burned out. He asked the driver for his license. When the driver failed to produce one the officer asked the other occupants for identification. Only Joe Alcala, who stated he had borrowed the car from his brother, produced a driver's license. After further discussion the officer asked the six occupants to step out. A traffic citation was issued for the defective lights, as well as for the driver's failure to produce a license. After being joined by another officer, the first officer then questioned each of the occupants. A third police car arrived. The first officer then asked Alcala if he could search the car, and Alcala consented. Alcala was not advised that he had the right to refuse to consent, nor are we referred to any indication in the record that he had knowledge of such right. Three checks of the carwash were found wadded up under the left

rear seat. Each was signed in the name of the owner of the carwash and was filled in by resort to a check protector. On the basis of statements later obtained from the driver of the car, a warrant was obtained for the search of two other cars. These searches resulted in the seizure of the check protector and several blank checks.

The principal contention made on this appeal is that the state trial court erred in refusing to suppress the evidence obtained in the search of the Ford. The state courts proceeded on the theory that the search had been consented to and was therefore lawful. Appellant takes issue with this determination on the ground that the Government has failed to demonstrate that the consent was given with knowledge that it could be withheld.

At the time of the search there was no probable cause to believe that the car contained anything that could properly be seized. The search, thus, was one from which Alcala had a constitutional right to be free.<sup>1</sup> Any consent to the search, then, amounted to a waiver of a constitutional right and, to be effective, must meet the established standards for constitutional waiver.

These have been discussed by this court in *Cipres v. United States*, 343 F.2d 95 (9th Cir. 1965), and

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<sup>1</sup>The other occupants of the car also have standing to assert Alcala's right. *Jones v. United States*, 362 U.S. 257 (1960); compare *Cotton v. United States*, 371 F.2d 385, 390-91 (9th Cir. 1967), with *Diaz-Rosendo v. United States*, 357 F.2d 124, 132 (9th Cir. 1966) (*en banc*).

*Schoepflin v. United States*, 391 F.2d 390 (9th Cir. 1968).

" \* \* \* a waiver cannot be conclusively presumed from a verbal expression of assent. The court must determine from all the circumstances whether the verbal assent reflected an understanding, uncoerced, and unequivocal election to grant the officers a license which the person knows may be freely and effectively withheld \* \* \*." *Cipres v. United States*, 343 F.2d 95, 97 (9th Cir. 1965).<sup>2</sup>

From the record before us it is not clear that the California courts have made an adequate finding of the necessary understanding. With reference to Bustamonte's knowledge, the California Court of Appeal, *People v. Bustamonte*, 270 Cal.App.2d at 653, stated:

"The basic premise behind the California rule was stated in *People v. MacIntosh* [264 A.C.A. 834] at page 838: 'When permission is sought from a person of ordinary intelligence the very fact that consent is given \* \* \* carries the implication that the alternative of a refusal existed.'"

It would appear that the California courts, in addition to finding that the atmosphere was not coercive, have relied entirely on the verbal expression of assent. They have reasoned that the mere request for consent carries with it an implication that consent may be withheld and that knowledge of this implication may be

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<sup>2</sup>We find nothing in the Supreme Court's opinion in *Bumper v. North Carolina*, 391 U.S. 543 (1968), to cast doubt on the continued vitality or breadth of these principles. On the contrary, *Bumper*, although not concerned with the issue before us now, expressly approved a number of lower court opinions which had required that waiver of Fourth Amendment rights be both uncoerced and intelligent.

inferred from assent. Yet, as we have noted, mere verbal assent is not enough. Further, in our view, the "implication" apparently relied upon by the California courts can hardly suffice as a general rule. Under many circumstances a reasonable person might read an officer's "May I" as the courteous expression of a demand backed by force of law.

We conclude that the District Court should direct its attention to the issue of the existence of such knowledge as is required under *Cipres* and *Schoepflin*. If it concludes that no adequate and acceptable state court finding has been made upon this issue, then it should make its own finding, conducting a hearing if necessary to develop the facts.

We find no error in the District Court's rulings with respect to other grounds asserted in the petition.

The District Court order denying writ is vacated and the matter is remanded for further proceedings.

**Appendix C**

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United States District Court  
for the Northern District of California

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C-70 303

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Robert Clyde Bustamonte,	}
vs.	
Merle R. Schneekloth, Superintendent, California Conservation Center,	
Respondent.	

**ORDER GRANTING MOTION TO FILE IN  
FORMA PAUPERIS AND DENYING  
PETITION FOR WRIT OF HABEAS CORPUS.**

Petitioner alleges that the search of two automobiles which produced the checks in question was unconstitutional. He argues that the affidavit supporting the search warrant was defective in that the informant was not proven to be reliable, and there were no underlying facts to allow the magistrate to make an independent judgment. As the California Court of Appeals decision points out, the situation in which the informant was found lent credence to his reliability. Regarding the element of underlying facts, this was satisfied by the corroboration of the informant's

facts. *People v. Bustamonte*, 270 A.C.A. 707, 714-15 (1969).

Petitioner's claim that there was no consent to the search is unsubstantiated.

Petitioner's third claim is that the trial court erred in allowing the policeman to testify that the petitioner said in response to *Miranda* warnings, "I don't care to say anything." This error does not, in view of the circumstances, meet the constitutional test of prejudicial error. See *Chapman v. California*, 386 U.S. 18 (1967).

It Is Hereby Ordered that the petition for a writ of habeas corpus be denied.

Dated: February 6, 1970.

Alfonso J. Zirpoli,  
United States District Judge



**Appendix D**

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*In the Court of Appeal  
State of California  
First Appellate District*

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**DIVISION ONE**

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1 Criminal No. 6455

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People of the State of California, Plaintiff and Respondent, vs. Robert Clyde Bustamonte, Defendant and Appellant.	}
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**OPINION**

Defendant appeals from a judgment of conviction, following a jury trial, of possession of a completed check with intent to defraud (violation of Pen. Code, § 475a). Defendant contends that the trial court erred in failing to grant his motions to suppress evidence taken in two separate searches of automobiles, and further that the trial court erred in denying his motion for a mistrial because of a comment on his silence made at the trial by a police officer testifying as a prosecution witness.

*The Facts*

On the morning of January 19, 1967, Charles Kehoe, owner of the Speedway Car Wash in Mountain View, discovered that the business office had been burglarized some time since he had closed on the previous day. A check-writing machine, known as a check protector, and a number of blank checks had been removed from the office.

On January 21, 1967, Joe Gonzales and Joe Alcala went with defendant to the Food Fair Market in Mountain View. According to the testimony of Gonzales, defendant filled out a check while they were in the parking lot. This check was a Speedway Car Wash check "protectorized" in the amount of \$63.75 and defendant made it out to a "Joe Garcia" and signed it with Kehoe's name. Gonzales took the check into the market where he cashed it in the process of buying a carton of cigarettes. Kehoe identified the check payable to Garcia and stated the signature was not his. After cashing the check on January 21, defendant, Gonzales and Alcala went to defendant's home. Gonzales saw defendant and Alcala lean over the open trunk of defendant's parked Oldsmobile automobile and then the two returned to the truck where Gonzales was waiting, bringing with them two additional Speedway Car Wash blank checks. The amounts of money were filled in on the checks but no names or signatures were entered. The men next unsuccessfully attempted to cash another check at the Blue Bonnett Bar in Sunnyvale.

Gonzales testified that at some time before the incidents of January 21 defendant had shown him the check protector and some blank checks which were contained in the trunk of a Camaro automobile which had been rented by defendant.

On January 31, 1967, defendant, Alcalá and Gonzales went to San Jose to find persons willing to use false identification for the purpose of cashing checks. At about 11:00 p.m. they picked up three other men. Attempts to cash checks at grocery stores and a bar were futile. During the evening they stopped at the Moonlite Shopping Center where Gonzales saw defendant take some checks from defendant's Renault automobile which was in the parking lot.

Police Officer James Rand of the Sunnyvale Department of Public Safety was in a police vehicle alone on routine patrol at approximately 2:40 a.m. on January 31, 1967. He observed an oncoming vehicle which had only one functioning headlight. Rand made a U-turn and also observed that the automobile in question did not have an automobile license plate light. He stopped the automobile which was a black 1958 Ford 4-door sedan. Six men were in the automobile at the time it was stopped, and Rand testified that defendant was in the front seat along with Alcalá, and that Gonzales was driving. After Gonzales failed to produce a driver's license, officer Rand asked if any of the occupants of the Ford had identification. Only Alcalá produced a driver's license and he indicated that the automobile belonged to his brother. Officer

Rand asked the occupants to step out of the automobile. After the men were out of the car and after officer Rand was joined by officer Bissell and Captain Crabtree, he asked Alcala if he could search the car. According to officer Rand's testimony, Alcala replied "Sure, go ahead." Gonzales also testified that Alcala had given permission for the search and had actually aided the officers. Officer Rand and Captain Crabtree searched the Ford. Wadded up under the left rear seat they found three checks. Each of the checks was "protectorized" in the amount of \$67.34, each was signed with the name of Kehoe as maker, and each was a Speedway Car Wash check. One was payable to Robert Gomez and two were payable to Jino Anthony.

Later, pursuant to a search warrant, the Renault at the Moonlite Shopping Center and defendant's Oldsmobile in Sunnyvale were searched. Two checks were found in the Renault and the check protector and several blank checks were found in the Oldsmobile, along with a number of traffic citations naming defendant. A criminologist testified that in his opinion the writing on the Speedway Car Wash checks was the writing of defendant.

### *Search of the Ford*

At the time that officer Rand and Captain Crabtree searched the Ford automobile and discovered the three completed checks, there was a total of three police officers and three police vehicles on the highway near the stopped automobile. The occupants were asked to

step out of the car and at one point Gonzales was told to stand by the car; at another time Alcala was told to back away from the area of the search. Gonzales was also given a citation for the missing lights and for his failure to produce a driver's license. According to Gonzales' testimony, the police cars did not have the passengers hemmed in. No one was under arrest at the time of the search and none of the individuals had been advised as to any constitutional rights. After testimony was taken in chambers on the constitutionality of the search, the court ruled that there had been consent to the search and the motion of defense counsel to suppress the evidence was denied.

Defendant, relying on *Parrish v. Civil Service Commission*, 66 Cal.2d 260,<sup>1</sup> now contends that Alcala's consent to the search was obtained in a coercive atmosphere, that the consent was therefore involuntary and the subsequent search consequently illegal. Although we agree with defendant that it is inconsequential that the search involved Alcala's constitutional rights rather than the rights of defendant (see *People v. Perez*, 62 Cal.2d 769, 775-776), we conclude that his basic argument is without merit. As the court stated in *People v. Michael*, 45 Cal.2d 751, 753: "Whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority, is a question of fact to be determined in the light of all

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<sup>1</sup>This case stands for the proposition that consent obtained by "covert threats of official sanction or by implied assertions of superior authority" is not voluntary consent. (P. 268.)

the circumstances." (See also *Castaneda v. Superior Court*, 59 Cal.2d 439, 442.) In the instant case the prosecution met the necessary burden of showing consent (see *Castaneda v. Superior Court*, *supra*, at p. 444) since there were clearly circumstances from which the trial court could ascertain that consent had been freely given without coercion or submission to authority. Not only officer Rand, but Gonzales, the driver of the automobile, testified that Alcalá's assent to the search of his brother's automobile was freely, even casually given. At the time of the request to search the automobile the atmosphere, according to Rand, was "congenial" and there had been no discussion of any crime. As noted, Gonzales said Alcalá even attempted to aid in the search.

Defendant also argues that there could be no voluntary consent to the search without prior advice to Alcalá that he had a legal right to refuse permission to search the car. Defendant particularly relies on the federal cases of *United States v. Blalock* (E.D. Pa. 1966) 255 F.Supp. 268 and *United States v. Nikrasch*, 367 F.2d 740 which stand for the proposition that subjects of investigation should be advised of their rights to insist on a search warrant. This rule as it applies in the federal courts has not been adopted as the governing rule by the courts in California. As we stated in *People v. Linke*, 265 A.C.A. 322, 340: "the courts have rejected the argument that consent will be ineffective in the absence of a warning to the person addressed of his rights under the Fourth Amendment." (See *People v. Davis*, 265 A.C.A. 367,

374; *People v. Cirilli*, 265 A.C.A. 685, 688; *People v. Slade*, 264 A.C.A. 227, 229; *People v. MacIntosh*, 264 A.C.A. 834, 838-839; *People v. Richardson*, 258 Cal. App.2d 23, 31; *People v. Dahlke*, 257 Cal.App.2d 82, 87; *People v. Campuzano*, 254 Cal.App.2d 52, 57; *People v. Chaddock*, 249 Cal.App.2d 483, 485; *People v. Roberts*, 246 Cal.App.2d 715, 729.) The basic premise behind the California rule was stated in *People v. MacIntosh*, *supra*, at page 838: "When permission is sought from a person of ordinary intelligence the very fact that consent is given . . . carries the implication that the alternative of a refusal existed."<sup>2</sup>

### *Search of the Oldsmobile*

At the trial of the case, defense counsel moved to suppress the evidence (including the check protector) taken from defendant's 1956 Oldsmobile on the ground that the affidavit supporting the search warrant was insufficient. The motion was denied and the evidence was admitted. Defendant contends that it was error for the trial court to deny this motion since the affidavit did not provide probable cause for the issuance of the

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<sup>2</sup>In *People v. Henry*, 65 Cal.2d 842 the Supreme Court stated "it is unnecessary to consider whether valid consent can be found in the absence of proof that defendant was advised of his constitutional rights pertaining to searches" (at p. 846) and it has been suggested that this language indicates that the Supreme Court considers the question an open one. (See *People v. Griffin*, 250 Cal.App.2d 545, 550, fn. 4.) However, in *People v. Campuzano*, *supra*, 254 Cal.App.2d 52, Justice Kingsley entered a dissent at page 58 on the ground that defendant should have been warned of his Fourth Amendment rights. But as was pointed out in *People v. Dahlke*, *supra*, 257 Cal.App.2d 82 at page 87, the Supreme Court nonetheless denied a hearing in *Campuzano*.

search warrant. The affidavit<sup>3</sup> in question was signed by officer John Tomac and essentially stated as follows: that the officer had been charged with the investigation of the subject burglary of Speedway Auto Wash and had probable and reasonable cause to believe that a Paymaster Check Protector, Speedway Auto Wash checks and Speedway Auto Wash wash tickets were located in an Oldsmobile and a Renault

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<sup>3</sup>The affidavit in its entirety reads as follows:

"Personally appeared before me this 31st day of January, 1967, John Tomac, who, on oath, makes complaint, and deposes and says that there is just, probable and reasonable cause to believe, and that he does believe, that there is now located in a 1956 Oldsmobile, license #CGN 877 located at 622 North Bayview Avenue, Sunnyvale, California, and a 1960 Renault, license #SCN 462 located at 2780 El Camino Real, Santa Clara, California, personal property described as follows:

1. A Paymaster Check Protector;
2. Speedway Auto Wash checks;
3. Speedway Auto Wash wash tickets.

"That your affiant has been a police officer for 10 years and in charge of the Mountain View Police Department Detective Bureau for 5 years. Affiant has been investigating a burglary of Speedway Auto Wash, 343 El Camino Real, Mountain View, California, which occurred the night of January 18-19, 1967.

"That your affiant has been informed that the Sunnyvale Police Department stopped a car at 2 a.m. on January 31, 1967, which car contained 6 people and in which car were found 3 Speedway Auto Wash checks which had been taken in the above described burglary; that your affiant has seen those checks and was informed by Arthur Gonzales, one of the said 6 persons in that vehicle, that the check protector taken in the above described burglary and some of the above described Speedway Auto Wash checks are located in the above described Oldsmobile, and that some Speedway Auto Wash checks are located in the above described Renault automobile.

"That your affiant has been told by Detective Ronald McMaster that he (McMaster) looked into the above described Renault and was able to see Speedway Auto Wash checks inside said vehicle.

"Affiant believes the information furnished by said Arthur Gonzales to be reliable and affiant believes said stolen property will be located where first above described.

"That based upon the above facts, your affiant prays that a Search Warrant be issued with respect to the above location for the seizure of said property, and that the same be held under Calif. P. C. Sec. 1536 and disposed of according to law."



automobile which he particularly described; that he had been informed of the incident involving the stopping of the Ford automobile on January 31, 1967, and that he had seen the three checks found therein; that he was informed by Gonzales, one of the six persons in the Ford vehicle, that the above-described check protector taken in the above-described burglary and some of the above-described checks were located in the said Oldsmobile, and that some of said checks were located in said Renault; that affiant was told by Detective Ronald McMaster that McMaster had looked into the said Renault and was able to see Speedway Auto Wash checks inside said vehicle; and that the affiant believed that the information furnished by Gonzales was reliable.

Defendant's chief argument is that the statement of the informer Gonzales was only conclusionary as to what would be found in the Oldsmobile and indicated no personal knowledge on the part of the informer. Accordingly, he asserts that the affidavit is insufficient because it fails to show a factual basis on which the magistrate could conclude that the informant was reliable, and because it also fails to indicate the factual basis of the informant's information.

The applicable rule as declared in *Aguilar v. Texas*, 378 U.S. 108, 114, requires that although an affidavit supporting a search warrant may be based on hearsay information and need not reflect the direct personal observations of the affiant, the magistrate must be informed of some of the underlying circumstances relied on by the person providing the information and

some of the underlying circumstances from which the affiant concluded that the informant was credible or his information reliable.<sup>4</sup> (See *People v. West*, 237 Cal.App.2d 801, 805.) In *West*, Justice Fleming notes that "*Aguilar* makes clear that a petition for a search warrant based solely on information from a reliable informant must set forth sufficient data in the supporting affidavit (1) to show that the informant is in fact reliable, and (2) to disclose the source of the informant's knowledge so that the examining magistrate can himself determine whether probable cause exists for the issue of the warrant." (P. 805; see also *Spinelli v. United States*, 37 U.S.L. Week, 4110, 4111.)

In the instant case the affiant set forth underlying circumstances which enabled the magistrate to independently judge the validity of the informant's conclusion that the check protector and some of the Speedway Car Wash checks were located in the Oldsmobile. These underlying circumstances are found in the fact that informant Gonzales was a passenger in the Ford at the time three completed Speedway Car Wash checks were discovered in the back seat. The fact of his presence was a sufficient ground for the magistrate to infer that Gonzales knew the source of the checks, the location of the check protector and the location of additional similar checks.

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<sup>4</sup>Decisions of the United States Supreme Court interpreting the Fourth Amendment apply to California procedure by virtue of the Fourteenth Amendment. (*Mapp v. Ohio*, 367 U.S. 643; *People v. West*, 237 Cal.App.2d 801, 804.)

The instant affidavit also discloses that the informant was credible and that his information was reliable. Although this reliability is not based on past experience with the informant, it is shown by substantial corroborative facts known or discovered. (See *People v. Cedeno*, 218 Cal.App.2d 213, 220; *People v. Gallegos*, 62 Cal.2d 176, 179.) In addition to the circumstance that Gonzales was a passenger in the Ford where three of the stolen checks had been found, this corroboration is supplied by the fact that Detective McMasters was able to see similar checks when he looked into the Renault automobile described in the affidavit and in which Gonzales had stated such checks were located.

#### *Comment on Defendant's Silence*

At the trial during the questioning of officer McMaster the following testimony was elicited by the district attorney: "Officer, prior to questioning Mr. Bustamonte, was he advised by you or someone in your presence of his rights? A. Yes, he was. Q. And who advised him of his rights? A. Detective Peck. Q. Was it done in your presence? A. Yes, it was. Q. And of what rights was he advised? A. He was advised of his right to counsel, right to remain silent, the fact that anything he did say to us could be used against him in court and would be used against him, and the fact that, if he could not afford counsel, one would be appointed to him. Q. Was he questioned as to whether he desired to waive those rights? A. Yes, he was. Q. And what did he say if anything? A. He stated that he didn't care to say anything." Following

this testimony a discussion was had between court and counsel out of the jury's hearing during which the prosecutor stated that he was surprised by McMaster's answer that defendant stated "he didn't care to say anything," and that he had expected the answer to be that defendant had stated he waived the rights specified in McMaster's admonition. Thereupon the trial court advised the jury that it was striking from the record this series of questions and answers concerning McMaster's admonition to defendant as to his rights, and the jury was instructed that they were "to disregard that series of questions." Thereafter, the trial court instructed the jury in its regular instructions that if an accused in police custody declined to answer questions put to him by the police, such fact was not to be considered by them as an inference of either his guilt or innocence.

Defendant's counsel moved for a mistrial on the ground that the subject testimony was a prejudicial, unconstitutional comment on defendant's silence. The trial court denied the motion and defendant now argues that the trial court erred in denying his motion because the error was such that it could not be cured by the admonishing instructions. This contention, in essence, is to the effect that the trial court committed error of the type condemned in *Griffin v. California*, 380 U.S. 609. *Griffin* forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt. (P. 615.)

In the instant case the testimony elicited from officer McMaster was in effect a "comment" by the prosecutor

on the accused's silence. (See *People v. Haston*, 69 A.C. 237, 259-260.) However, the comment was not allowed to stand but was specifically stricken from the record. Accordingly, it was removed from the jury's consideration and was not before it. (See *People v. Medina*, 265 A.C.A. 794, 799.) Moreover, the jury was specifically instructed to disregard the testimony which produced the comment. In addition, the trial court instructed the jury that if the accused declined to answer questions put to him by the police, such fact was not to be considered as evidence of guilt. We conclude, therefore, that the court's ruling and its admonitions obviated the claimed error.

Even if we were to assume that the error could not be cured by the admonishing instructions, it cannot be said that the error resulted in a miscarriage of justice which would require a reversal of the judgment. In view of the overwhelming evidence against defendant, there is no reasonable possibility that a different verdict would have been reached had the subject testimony not been given. Accordingly, we are able to declare a belief that it was harmless error beyond a reasonable doubt. (*Chapman v. California*, 386 U.S. 18, 24.)

The judgment is affirmed.

Molinari, P.J.

We concur:

Sims, J.

Elkington, J.

Filed Mar. 14, 1969,

Lawrence R. Elkington, Clerk.

**Appendix E****EXCERPTS FROM REPORTER'S TRANSCRIPT**

In the Superior Court of the State of California  
In and For the County of Santa Clara  
Department No. 5  
Before Honorable Peter Anello, Judge, and a Jury.

People of the State of California,	} No. 42,977
Plaintiff,	
vs.	
Robert Clyde Bustamonte,	
Defendant.	

San Jose, California, April 5, 1967, 1:52 o'clock p.m.  
Appearances:

For the Plaintiff:

Leo Himmelsbach, Esq.,  
Deputy District Attorney,  
190 West Hedding Street,  
San Jose, California.

For the Defendant:

Taketusugu Takei, Esq.,  
Deputy Public Defender,  
425 West Hedding Street,  
San Jose, California.

**Rep. Tr. p. 9, lines 11-19:**

The Court: Okay. Let me ask you, are there any constitutional problems that you anticipate arising in this case?

Mr. Takei: Well, I don't know whether you call—well, constitution in a sense. There is a question of the initial stop. There was a stop of a vehicle.

The Court: You mean, search and seizure?

Mr. Takei: Yes; and I think there might be some problem as to the question of the corroboration.

**Rep. Tr. p. 75, line 10 to p. 84, line 26:**

*James Robert Rand,*

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: You may take the stand, please, sir. Would you state your name and address for the record, sir.

The Witness: James Robert Rand, Sunnyvale Department of Public Safety, Sunnyvale.

**Direct Examination**

By Mr. Himmelsbach:

Q. You were so employed on the 31st of January, 1967?

A. Yes, sir, I was.

Q. Approximately 2:40 a.m. of that date, was your attention directed to a vehicle?

A. Yes, sir, it was.

Q. Now, at the time you were on what we might call routine police patrol?

A. Yes, sir.

Q. And operating a police vehicle?

A. Yes.

Q. Were any other officers with you at that time?

A. No.

Q. All right. Then, where was this vehicle when you first observed it?

A. It was proceeding eastbound on El Camino Real in approximately the area of Highway 9.

Q. Where were you relative to this vehicle?

A. I was westbound.

Q. So, it would be an on-coming vehicle, is that correct?

A. Yes.

Q. And what, if anything, attracted your attention to this vehicle?

A. The fact that there was a headlight out.

Q. And what did you do upon observing the condition of the headlights of this vehicle?

A. I made a U-turn at Highway 9 and El Camino, proceeded after the vehicle and noticed that there was also license plate light was out.

Q. License plate, the light was out. So, observing these two alleged equipment defects, what did you do, if anything?

A. Approximately at Wolf and El Camino I stopped the vehicle.

Q. And how many persons were in that vehicle?

A. Six.

Q. What type of a vehicle was this?

A. A 1958 Ford black four-door.

Q. And six people in the vehicle. Could you describe them as to male, female?



A. Six male occupants.

Q. Six male occupants. And how many in each seat of the vehicle?

A. Three in front and three in the back.

Q. Did you, upon stopping the vehicle, did you approach the driver of the vehicle?

A. Yes, sir, I did.

Q. And did you question him as to his identity?

A. Yes.

Q. And did he identify himself?

A. By word only.

Q. By what?

A. By word only.

Q. By word only. What did he tell you his name was?

A. Arthur Gonzales.

Q. All right, And do you recognize the defendant in court?

A. Yes, sir.

Q. And was he a passenger? Was he an occupant of this vehicle?

A. Yes, sir.

Q. And at the time you stopped the vehicle, where was Mr. Bustamonte in the vehicle?

A. He was in the right-hand front seat.

Q. The right-hand front seat, all right. Initially on stopping the vehicle then, did you—you did question the driver, is that correct?

A. Yes.

Q. And is it your usual, uniform practice in a case of stopping a vehicle, to ask for a driver's license?

A. Yes.

Q. Did you ask the driver of the vehicle for a license?

A. Yes, I did.

Q. And was he able to produce the license?

A. No.

Q. And did he indicate to you where his license was or whether he had a license?

A. He stated he didn't have it with him.

Q. He didn't have it with him, all right. Did you question any of the other occupants at this time?

A. Yes, I did.

Q. And who did you question?

A. I asked the other occupants in the vehicle if they had any other identification.

Q. Was this a general question put to the group or did you at this time individually ask a particular occupant or occupants of the vehicle?

A. This was general at this time.

Q. All right. And did you get a response from any of the occupants?

A. Yes, sir.

Q. And what response did you get?

A. The subject sitting in the middle of the front seat produced his driver's license. The other four subjects had no identification.

Q. Now, the subject sitting in the middle of the front seat, he produced his driver's license?

A. Yes, sir.

Q. And what was the name on that driver's license?

A. Alcala.

Q. Do you recall the first name?

A. No, sir, I don't.

Q. Did you make a report on this?

A. Yes, sir.

Q. Did your report include the name of the individuals?

A. I believe so.

The Court: Excuse me, Officer. What time of the evening was this?

The Witness: Just approximately 2:45 in the morning.

Q. So, a person by the name of Alcala produced a driver's license?

A. Yes, sir.

Q. And he would be the person in the middle of the front seat?

A. Yes, sir.

Q. Did any of the other occupants make any statement as to whether they had identification or not?

A. Yes, sir, the—not that they had any identification, no.

Q. Well, did they remain—You indicated previously your question was to the occupants, someone have—generally to the effect that someone in the vehicle have identification. You say Mr. Alcala produced a driver's license?

A. Yes, sir. Well, the defendant said he knew me. As I looked at him, I knew that I had known the subject.

Q. You knew him by sight as someone you had seen before, is that correct?

A. Yes.

Q. Did you know his name?

A. Yes, I believe at that time I did.

Q. Did you ask him for any identification?

A. Yes.

Q. And what did he tell you?

A. He didn't have any.

Q. He didn't have any identification. And did you ask the occupants of the back seat for identification?

A. Yes, sir.

Q. What response did you get?

A. They didn't have any.

Q. They had no identification. Now, just observing this driver who identified himself as Arthur Gonzales, did you—will you tell us about approximately how old he appeared to be to you at the time?

A. Teenager.

Q. Teenager?

A. Yes.

Q. All right. And Mr. Alcala, would you—get any impression of his approximate age at the time?

A. Twenty.

Q. Approximately twenty years old. How about the occupants of the back seat? Would you describe those three males?

A. Appeared to be much older than the three occupants of the front seat.

Q. Well, you say, "much older." How old did they appear to you to be at the time you formed an impression?

A. Thirty on up, thirty, forty, fifty.

Q. You're saying—

A. Excuse me. Go ahead.

Q. Well, how old did the oldest one appear to be to you?

A. About forty-five.

Q. All right. Now, did you at this time, at the time you had asked these questions about identification, were any other officers present?

A. Yes, Officer Bissell arrived on the scene shortly after the car stopped.

Q. Had you requested his appearance?

A. This is standard procedure, during car stops between dusk and dawn, you go on the radio and say you're making a car stop at this location, such and such license number, and the nearest unit to that location will automatically fill in.

Q. What they call a fill in, is that correct?

A. Yes.

Q. All right. Did any of them produce any identification then other than this Mr. Alcala?

A. No.

Q. All right. Did you make any effort to ascertain who was the—who was the owner or the person entitled to possession of the car at that time?

A. This was volunteered.

Q. Pardon?

A. This was volunteered.

Q. By whom?

A. By the driver and the subject Alcala.

Q. All right. And the driver is this person who identified himself as Arthur Gonzales, is that correct?

A. Yes.

Q. And what did the driver tell you?

A. That it was his brother's car, gesturing to the Alcala subject.

Q. Did you question Mr. Alcala then?

A. Yes, I did.

Q. And what did he tell you with regard to——

Mr. Takei: Your Honor, I object to any statements made by a party not present in court as hearsay.

Mr. Himmelsbach: Your Honor, this is being offered as reasonable cause for a subsequent search which will be developing in the next few minutes, and I think hearsay would be admissible.

The Court: Yes.

Mr. Himmelsbach: Strictly for the purpose.

The Court: Objection will be overruled.

Q. What did Mr. Alcala tell you?

A. He stated it was his brother's car.

Q. Now, Officer Bissell had arrived. Did any other officer or officers arrive at or about this time?

A. Not at that time.

Q. What next was done regarding the occupants of the vehicle?

A. The—— Asked the occupants to step out of the vehicle. We talked to the occupants trying to determine what the situation was at that time.

Q. All right. And did you question—whom did you question in this regard?

A. We started with the—I talked to the subjects in the back seat asking them who they were, where they were from, et cetera.

Q. Did they give you their name?

A. Yes.

Q. And did you question any of them as to what they were doing in the car or where they were going?

A. Yes, sir.

Q. And specifically, did any particular individual give you an answer?

A. Yes, as to where they were going.

Q. All right. Who was that person, do you know, or did he identify himself by name?

A. I believe that would be Jino Anthony.

Q. All right.

A. And Otis Bruce, the two subjects that were in the back seat.

Q. They were two of the subjects that were in the back seat?

A. Yes.

Q. And who was the third subject, at least, how did he identify himself?

A. Rohrer.

Q. Rohrer?

A. Yes.

Q. That would be Richard Rohrer?

A. Yes.

Q. R-o-h-r-e-r?

A. Yes.

Q. Did either of these individuals indicate what they were doing in the car and where they were going?

A. They were going to San Jose.

Q. Who told you this?

A. This was subject Rohrer and was confirmed by the other two occupants.

Q. Going to San Jose? Did they indicate what they were doing in the car, that is—not where they were going, but how they happened to be in the car?

A. They were picked up by the three occupants in the front seat.

Q. When and where or did you ask?

A. May I refer to my notes?

Mr. Takei: Excuse me, Your Honor. I don't see how this can be admissible as hearsay to establish probable cause. I don't see any relationship at this time.

Mr. Himmelsbach: Your Honor, I might indicate to the Court, attempting to develop suspicious circumstances surrounding the stop of this car, the disparity of the ages, the hour of the night, and I intend to develop that there were conflicting stories given by the occupants of the back seat as to where they'd come from, where they were going, and whether they knew each other. They completely—

The Court: Approach the bench, please.

(Sotto-voce discussion between Court and counsel at the Bench.)

The Court: Ladies and gentlemen of the jury, we're going to take a recess at this time because we have one of those problems that I referred to the other day, namely, it's a legal question involved that necessarily has to be discussed outside the presence of the jury, and counsel have indicated that perhaps it may take some time.

**Rep. Tr. p. 86, line 3 to p. 109, line 11:**

(Pursuant to recess, court convened in chambers out of the presence of the jurors, and the following proceedings were had:)

The Court: All right, let the record show we are in chambers. The defendant is present with his counsel.

You may proceed.

Mr. Himmelsbach: Thank you.



*James Robert Rand,*

the witness on the stand at the time of the recess, resumed the stand and testified further as follows:

Direct Examination (Resumed)

By Mr. Himmelsbach:

Q. Officer Rand, you understand you are still under oath even though we are testifying in chambers?

A. Yes.

Q. All right. Officer, after you stopped the car and had some discussion with the passengers in the car, did you leave all these people in the car? Did you have them get out of the car? What occurred?

A. At this time they stepped out of the car. We had conversations with them individually.

Q. And that would be—you say individually. One at a time where they were separated or in groups?

A. Right, right.

Q. All right. And, during the conversation, did you or any other police officer in your presence ask the permission or any person's permission to search the automobile?

A. Yes, we did.

Q. What was done in this regard?

A. I asked subject Alcala if we could look through the car.

Q. And why did you select subject Alcala?

A. Because he was the one most directly related to the automobile.

Q. In what way?

A. Because it was his brother's car.

Q. What was the basis of your information that it was the brother's car?

A. His statement.

Q. Had you checked the registration or anything at that time?

A. No.

Q. Incidentally, did you write a citation to Mr. Gonzales, the driver of the vehicle—did you write a traffic citation?

A. Yes, I did.

Q. To Mr. Gonzales?

A. Yes.

Q. You cited him for what violation?

A. Headlight out, taillight out and no license in possession.

Q. When you questioned Mr. Alcalá regarding permission to search the car, where was Mr. Alcalá?

A. He was standing outside the car.

Q. Outside of what car?

A. Outside of his car, outside the Ford.

Q. Was anyone else in the immediate presence, either other officers or any of the parties?

A. Several of the parties were present, Captain Crabtree, Officer Bissell. I believe that Mr. Gonzales was in the immediate vicinity, also.

Q. How about Mr. Bustamonte?

A. Should have been. They were all standing, close proximity to each other.

Q. And you asked Mr. Alcalá if you could search the car, and did he give any reply to this?

A. Said, Sure, go ahead."

Q. As best you can recall, were those his exact words?

A. Close as I can recall, more like an offhand statement like, you know, "Go ahead. Help yourself."

Q. What did you do at that time?

A. At this time Captain Crabtree and myself started to make a thorough search of the car.

Q. And during the search of the car, was anything discovered——

Mr. Takei: Excuse me.

Q. ——in there on—in your presence——

Mr. Takei: Excuse me. Before we go further as to the actual search, I'd like to voir dire the officer further on the question of consent.

The Court: All right, you may.

### Voir Dire Examination

By Mr. Takei:

Q. Officer Rand, when you asked Mr. Alcala permission to search the car, do you recall the words that you used?

A. Gee, I can't, you know, give you the exact wording used. The effect was, "Can we search the car."

Q. Now, did anybody else ask Mr. Alcala prior to your asking him? Do you know whether any other officer——

A. I don't know, no, I don't know.

Q. Did you ask him more than once or just once?

A. Don't recall.

Q. Now, you stated at that time he was outside of the car, is that correct?

A. Right.

Q. And they were standing around. Were they under arrest at that time?

A. No.

Q. This is more in the— What was the purpose of the search of the vehicle?

A. Well, the fact at the time and the—had no identification and that the three subjects in the front seat were somewhat younger than the three guys in the back seat, they didn't seem to have anything in common together, you know. If it was six teenagers, you know, you'd see they were all pretty much the same age; and then the conflicting stories of who picked up who and they were going where, you know, was all—didn't fit in right.

Q. You said they told you they were going to San Jose, is that correct?

A. Right.

Q. And that—strike that.

Now, when you asked Mr. Alcala permission to use his car, you say he was not under arrest at that time?

A. No.

Q. To search his car?

A. No.

Q. Was anybody under arrest at that time?

A. No, not to my knowledge.

Q. Did you have a search warrant at that time?

A. No.

Q. Now, when you asked Mr. Alcala his permission to search the car, did you advise him that he didn't have to agree to permit you to search the vehicle?

A. I don't believe so.

Q. Now, prior to this, I believe you had—they were outside of the vehicle. Did they get out voluntarily or did you tell them to get out?

A. First one that got out of the car was Mr. Rohrer sitting on the back seat, and we talked to him. Then, the others, as we talked to them, got out of the car.

Q. Did they get out at your request?

A. Not at my specific request 'cause Officer Bissell was there, too.

Q. Well, was it——

A. I believe it was.

Q. ——at the request of other officers?

A. Right.

Q. But, you had not advised them that they were under arrest?

A. No.

Q. How many officers were present at that time beside Officer Bissell?

A. Well, we called for Captain Crabtree to come over, and he came down. And he subsequently called for two more units, I believe Officer Sheehy was one, and I can't recall right offhand who the other officer was.

Q. This would seem like it would be about five vehicles there?

A. About four police cars.

Q. Four police cars?

A. During the whole time we were there.

Q. This was before the commencement of the search?

A. Yes three.

Q. Three?

A. Yes.

Q. Yourself, Officer Bissell and——

A. Captain Crabtree.

Q. Crabtree?

A. Yes.

Q. This is prior to the search?

A. Right.

Q. And after the search, the other cars came?

A. Right, to my best recollection.

Q. Was there anybody else around at the time besides the car that you stopped and the police officers?

A. Not that I recall.

Q. Were they at this time, the car they were riding, was this pulled over to the side or parking lot or what?

A. Pulled over to the side of the road.

Q. After you initially stopped them, did you ask them to move the car some place?

A. No.

Q. The car remained there?

A. That's right.

Q. From there they got out of the car and——

The Court: Excuse me. Would you make your answer audible?

A. Oh, yes, excuse me.

Mr. Takei: I have no further questions.

## Direct Examination (Resumed)

By Mr. Himmelsbach:

Q. Prior to making a search of the car, had you threatened to arrest anybody?

A. No, this was all very congenial at this time.

Q. What do you mean "confusing" at this time?

A. Congenial.

Q. I'm sorry. Had you questioned anybody regarding any specific crime or crimes other than the circumstances surrounding the citation itself, the vehicle?

A. No.

Mr. Himmelsbach: No further questions of this witness, Your Honor.

The Court: You don't intend to go into the search?

Mr. Himmelsbach: I think, perhaps, I'd put on another witness, Your Honor, at this time, and then—well, I could go into the search.

The Court: I thought you were going to, but for his request to voire dire the witness further.

Mr. Himmelsbach: Might have asked this question.

Q. (By Mr. Himmelsbach) Officer, subsequent to your conversation with Mr. Alcalá, did you search the vehicle?

A. Yes.

Q. And did you find anything unusual?

A. Yes.

Mr. Takei: Well, Your Honor, for the record, I'd like to make an objection to the admission of any of the officer's statements to what he found in the car and the admission of any evidence that he found in the car on the ground that this was an improper

search. The officer had no people—not under arrest at that time. There was no search warrant. The officer states that he had the consent of Mr. Alcala, but the circumstances would seem to indicate at the time that the search was made by the officer, that it would not—the consent of Alcala was—I don't believe could truly be said voluntary consent. Would be more of a coercive consent, coercive in the officers—for one thing, the number of officers being present there and the police vehicles. They'd been told to get out of the car. They'd been requested, or somebody had to get out of the car.

They weren't advised that they could refuse to consent to the search of the car. I think, under the—viewing the entire circumstances factually, would seem to be not a voluntary consent but in the nature of police officers using their authority to, because they are police officers, and having citizens submit under those circumstances.

Mr. Himmelsbach: At this time, Your Honor, I would like to cite to the Court a couple of cases, one is *People versus Guyette*, 231 Cal. 2d at Page 460, where the appeal was based on a question of whether there was consent. In this case, basically, the defendant, along with two female accomplices, were arrested near a hotel on a search of passing forged checks. In questioning of one of the female accomplices, she told the police that there was a shotgun in her room which was jointly occupied by the females and defendant.

The police told her they would have to get a key to that room. The woman accomplice by the name of Mrs. Hagquist removed the key to the room from her



waistband without any particular comment, tossed it on the table. The court went on to hold that this was, in fact, her consent to search.

I think she testified at the trial, well, she hadn't really consented. She was a woman. She was surrounded by the police officers. But, to quote the court, they said such a gesture would lead a reasonable person under the circumstances to conclude that she consented that he should use the key, enter the room and conduct the search.

And further language of the court, I don't have the page, but it says, because, "It was the duty of the court to determine what Mrs. Hagquist appeared to do from her actions rather than from what she secretly thought. It was the objective, and not the subjective, occurrence that gave or denied the police consent to proceed."

And I think the cases in the area of consent, is held when—that it is objective, if it would appear to the officer that this person has genuinely consented to search, then the search is there. The officer can't judge what subjectively might be in the defendant's mind.

Subjectively, the defendant might, for example, say, well, I think there's something in the car, but they're not going to find it on this kind of a search, or if they find it, they can't tie it in to me, or, if—well, if I tell them, "No," they'll get more suspicious and figure out another way to make the search. And I think the Guyette case holds that it's the objective test that must be used.

At this stage in this particular case we have really no evidence now other than the testimony of the officer that there was consent.

The Court: Yes, that's what the Court had in mind, that there, being no other evidence at this particular point, the Court has no choice but to find that there was consent based upon the evidence thus far produced.

The Clerk: Your Honor, what's the citation, 231 Cal.2d?

The Court: That's what he said.

Mr. Himmelsbach: 231 Cal. App. 2d.

I would like at this time, however, Your Honor, to call another witness.

The Court: All right, you may do so.

Mr. Himmelsbach: Of the record on this case, at least.

The Court: You may do so.

Mr. Himmelsbach: Will you ask Mr. Joseph Gonzales to step in. He's the young man waiting out in the hall. I guess I should have Officer Rand leave at this time since they will be testifying about the same matter.

The Court: All right, would you mind stepping out for awhile.

(Witness Temporarily Excused.)

Mr. Takei: Your Honor, before we go into Gonzales, the formal ruling on my motion would be to deny it, is that correct, at this time?

The Court: What was your motion?

Mr. Takei: My motion was—I was objecting to the admission of any testimony of the officer.

The Court: The motion will be denied on the ground that the Court finds that, based on the evid-

ence thus far, that there was consent to search the automobile, yes.

The Clerk: Excuse me, if Your Honor please. There was another part to his motion, any evidence seized as a result——

Mr. Takei: Yes.

The Court: Yes. Well, we haven't come to that yet.

Mr. Himmelsbach: Mr. Gonzales, would you stand and raise your right hand. The clerk will swear you in.

*Joe Gonzales,*

called as a witness on behalf of the People, being first duly sworn, was examined and testified as follows:

The Clerk: Would you please state your name and address for the record.

The Witness: My name is Joe Gonzales. I live 579 Farley Street, Mountain View.

### Direct Examination

By Mr. Himmelsbach:

Q. Now, Mr. Gonzales, I want you to——

The Clerk: Could we get the spelling of his last name.

The Witness: G-o-n-z-a-l-e-s.

Q. (By Mr. Himmelsbach) I want you to understand that you've just been sworn as a witness in a jury trial, and the fact that we are now in chambers with the Judge and the defendant and the other court personnel doesn't change the fact that you are a witness under oath in this trial. You understand that?

A. Yes.

Q. And the fact the jury isn't present has nothing to do with your testimony. You are still testifying under oath.

A. Yes.

Q. In this case, All right. How old are you?

A. Seventeen.

Q. Seventeen years of age. Where are you employed?

A. Fjords Smorgas.

Q. Would you spell that for us?

A. F-j-o-r-d-s.

Q. Directing your attention to the 31st of January, 1967, approximately 2:40 a.m. in the morning, were you the driver of a vehicle?

A. Yes.

Q. And was that vehicle stopped by the police?

A. Yes.

Q. And what police department was that?

A. Sunnyvale.

Q. Sunnyvale Police Department. And about where was the car when it was stopped? Do you know what street you were on?

A. It was on El Camino and Wolf, I think.

Q. El Camino and Wolf Road?

A. Yes.

Q. All right. And after the—Who was in the car at the time it was stopped other than yourself?

A. Well, there was Bustamonte, Alcala and three other men.

Q. You say "Bustamonte." Sitting to my left is the defendant in this case, Robert Bustamonte.

A. Yes.

Q. That is the person you are referring to?

A. Yes.

Q. And a person by the name of Mr. Alcala?

A. Alcala.

Q. Do you know his first name?

A. Joe.

Q. Joe Alcala. And were there other people in the car?

A. Three other persons.

Q. Do you know who they were?

A. Jino Anthony and—I didn't catch the other two names.

Q. Did you know who they were at the time?

A. No.

Q. When had you first seen them?

A. That night.

Q. That night. All right. The car was stopped, and did a police officer approach you?

A. Well, he was approaching me and I walked out.

Q. You walked out, is that correct?

A. I walked out.

Q. Did he question you about anything about the way you were driving or the condition of the car?

A. Well, he was telling me about my high beams, they were on. I had my high beams on.

Q. And was there anything wrong with your headlights, by the way?

A. Yes, I think the left one wouldn't go on or—

Q. The left one wouldn't go on. Did he ask you if you had a driver's license?

A. He asked me, but I didn't have any.

Q. But you didn't have a driver's license?

A. No.

Q. Now, subsequent to this time, did the officer question the other people, ask any question of the other people that were in the car?

A. Yeah, he told me to stand by the car, then he went over there to the car.

Q. All right. Now, did—Whose car was this?

A. It was Pete Alcala.

Q. Peter, Peter Alcala?

A. Yes.

Q. Who is Peter Alcala?

A. That's Joe Alcala's brother.

Q. How did you happen to be driving when the car was stopped? Did Peter give it to you or who had given you permission to drive the car?

A. Joe did, Joe Alcala. He was tired, see, and I told him I wanted to drive.

Q. All right. And was—Did you hear anybody question as to who owned the car?

A. Well, no, I just—

Q. All right. Did you—Were you present—Did you hear anyone question with regard to searching the car?

A. Yeah, me and Joe Alcala were outside when Sunnyvale policeman asked Joe if he could search the car.

Q. Do you remember what words the Sunnyvale policeman used to the best of your recollection?

A. Oh, just, "Mind if I search your car?"

Q. And could you hear what Joe said, if anything?

A. Joe said, "Go right ahead."

Q. "Go right ahead," was that his words? Where was Mr. Bustamonte at the time Mr. Alcala said "Go right ahead"?

A. I'm not so sure if he was outside with us or inside a police car in the back seat.

Q. All right. It was cold this night?

A. Yeah, it was cold.

Q. And was anybody placed in the police car by the police?

A. No, me and Robert Bustamonte, we just sat in the back 'cause it was cold.

Q. Why?

A. It was cold.

Q. So, you don't know whether Mr. Bustamonte was close enough to hear this conversation, is that correct?

A. Not that I know.

Q. Assuming, if he was in the car and the window was up——

A. See, the windows, they were up. I don't think he could have heard it.

Q. He just said, "Go right——"

A. Yes, Joe said, "Go right ahead."

Q. Did Mr. Alcala question him in any way or, "Why do you want to search," or, "Have you got a search warrant?"

A. No. In fact, he even helped him.

Q. He even helped him?

A. Yes, he opened up the glove compartment and back in the trunk.

Q. You saw the officer enter the car then?

A. Yes, there was two of them.

Q. You say, when Mr. Alcala helped, did he actually get in the car or just lean in?

A. He asked him to open up the trunk, so he got the keys and opened up the trunk.

Q. How about the glove compartment, did you see him open—

A. No, actually, they told him to back off, he was standing behind when they were searching it.

Q. They told him to back off?

A. Well, he moved out of the way, see.

Q. All right. But, when they went to search the car, you say he opened the trunk or the glove compartment?

A. Well, see, he was near me and then the police officer asked Joe, he goes, "Does the trunk open?"

And Joe said, "Yes."

He went to the car and got the keys and opened up the trunk.

Q. He opened it for them?

A. Yes.

Mr. Himmelsbach: No further questions of this witness, Your Honor.

### Cross Examination

By Mr. Takei:

Q. Mr. Gonzales, when the officer was asking Joe Alcala permission to open the—look into the car or search the car or search the trunk, did you hear all the conversation?

A. Well, I was right next to Joe Alcala.

Q. You were next to Joe Alcala. And do you know or can you recall the words that the officer used when he asked Joe?



A. Like I said, "May I," you know, "search your car?"

Q. Do you know which officer asked that?

A. I think it was—no, no, I don't. I don't know his name.

Q. Did he make any threats to Alcala?

A. Not that I know. I don't think so.

Q. You heard most of the conversation, though, you say?

A. Yes.

Q. All of the conversation?

A. Well, not most of it, see, 'cause he was—'cause the officer that asked him if he could search, he was moving this tool chest in the back, he was lifting it up for him and everything, in the back of the trunk, and I was standing by the police car.

Q. How much did you hear, anyway, all of the conversation, most of the conversation, some of the conversation?

A. Mr. Himmelsbach: I think I'd have to object to the question as calling for the opinion and conclusion of the witness, Your Honor. He can testify what he did here [sic], but I don't think he can testify, give an opinion as to what he did not hear.

The Court: Well, do you want to clarify your question.

Q. Well, Mr. Gonzales, where were you standing when the officer came up and talked to Alcala about searching the car?

A. Right next to the police car.

Q. Was Mr. Joe Alcala next to you?

A. Yes.

Q. Where was he standing?

A. Right next to me, right by the front door. See, we were leaning against the police car, see, the car—the—Joe's car was right here, and there was one behind it and there was a car right over here (indicating), like in this slot type of thing.

Q. What do you mean, "slot type of thing"?

A. A lot, you know, like a driveway.

Q. You were parked on a driveway?

A. No, we were off the street, but there was like this driveway or, like a lot, you know, some type of, you know, pavement.

Q. Well, anyway, you were leaning against the police car at that time?

A. Yes.

Q. Right? With Joe Alcala?

A. Joe Alcala.

Q. Was he standing next to you?

A. Yes, he was standing right next to me. See, after, when the policeman said, "Can I search your car," then he went over there, see.

Q. Do you know whether the officer asked Mr. Alcala whether he owned the car?

A. No, not—Well, see, when they stopped us, Joe told me to tell them that, you know, it's his brother's car, which it is his brother's car.

Q. So, you told the officer that it was Joe's brother's car?

A. Yes, 'cause the officer asked me whose car it was.

Q. And when you were outside and standing up against the car, you heard the officer asking Mr. Alcala about the search?

A. Yeah.

Q. Is that correct?

A. Yes.

Q. And before he asked Mr. Alcala about permission to search the car, did he say anything to Mr. Alcala?

A. No, he just said, "Well, can I search your car?"

Q. Just came up to him and said, "Can I search your car?"

A. Yes.

Q. And he didn't give any reason?

A. No, no reason.

Q. And you said Joe Alcala said, "Sure, go ahead"?

A. Yeah, he said, "Go right ahead."

Q. Were you under arrest at that time?

A. No.

Q. You were leaning against the car?

A. Yeah, 'cause it was cold, you know. Was leaning against something.

Q. Did the officer advise Mr. Alcala that he didn't have to agree to let him search the car?

A. No, he didn't say nothing like that. He just said, well, "Just go right ahead," you know. He didn't have no——

Q. No, no, wait, wait. Listen to my question again. Did you hear the officer advise Mr. Alcala that he didn't have to agree to consent to the search?

A. I didn't hear that, no, didn't hear it.

Q. You didn't hear anything——

A. I didn't hear that, no.

Q. How many police cars were there?

A. Let's see. Only about—there was three Sunnyvale and one supervisor, deputy supervisor.

Q. Four police cars?

A. Yes.

Q. Were they all standing around?

A. Yes, there was two searching the car, and there was one by the radio, you know, one behind us.

Q. Did the police cars have you hemmed in?

A. No, just the police car behind me and there was one behind it, and there was one on the side where we were leaning.

Q. Side of the car that you were riding?

A. Yes.

Q. Was there one in front of the car, too?

A. No.

Mr. Takei: Thank you. I have no further questions.

Mr. Himmelsbach: Nothing further, Your Honor.

The Court: All right.

(Witness Excused.)

The Court: Anything else on this particular point?

Mr. Himmelsbach: No, Your Honor. I would request we proceed in front of the jury.

Mr. Takei: Well, Your Honor, I would object to any testimony of the search of the car on the ground that the police officer failed to advise Mr. Alcala that he could refuse to.

The Court: Do you have any authorities on that particular proposition?

Mr. Takei: Not at this time, Your Honor.

Mr. Himmelsbach: I don't believe——

Mr. Takei: I don't know if there is a case at this time.

The Court: This is the time that the Court is going to have to rule on it.

Mr. Takei: Yes, I understand fully, Your Honor. For the record I'm making the objection.

The Court: All right. Well then, the Court will deny your motion.

Mr. Takei: Thank you, Your Honor.

Mr. Himmelsbach: Thank you.

(Whereupon, court convened in the courtroom in the presence of the jurors and the following proceedings were had:)

The Court: Let the record show the defendant and all counsel and members of the jury are present.

Officer, would you resume the stand, please.

*James Robert Rand,*

resumed the stand and testified further as follows:

The Court: You may continue your examination.

Mr. Himmelsbach: Thank you, Your Honor.

#### Direct Examination (Resumed)

By Mr. Himmelsbach:

Q. Officer Rand, you did make a search of this vehicle, is that correct?

A. That's correct.

Q. And you were assisted by some other officer in making the search?

A. Yes, I was.

Q. Who was that?

A. That was Captain Crabtree.

Q. Now, in the course of your search, did you observe something unusual either that you located or that someone else located in your presence?

A. Yes, I did.

Q. And what was that?

A. Those were three checks that were in the vehicle.

Q. And where were those located?

A. They were underneath the back seat folded up or wadded up, as you may, in the left of the rear seat.

Q. In the left of the rear seat. Now, would that be — In order to do this, did you have to lift the seat out?

A. Yes.

Q. Seat was lifted out. And did you pick up the checks yourself from where they were in the vehicle or did you observe them picked up?

A. Captain Crabtree picked it up and unfolded it and showed it to me and I picked up the other two.

Q. Were the three of them together or were they separated underneath the seat?

A. They were separated within an area of six or eight inches apart.

Q. Six or eight inches apart, is that correct? All right, Officer, I'm going to show you People's Exhibit, for identification, 3-A, 3-B and 3-C and ask you to examine each of the exhibits. Have you had an opportunity to examine them?

A. Yes, sir.

Q. And I will ask you if you recognize any or all of those exhibits?

A. Yes, sir.

Q. And where did you first see them?

A. These were the checks that were removed from the vehicle.

Q. These were the three checks taken from under the back seat, is that correct?

A. Yes.

Q. And after they were taken from the back seat, who took the custody and control of them if you know?

A. I did.

Q. And what did you do with the checks?

A. I transported them to the station with the subjects, and I placed them in a plastic bag and turned them over to the officer from Mountain View.

Q. That would be Officer——

A. McFadden.

Q. McFadden from Mountain View Police Department?

A. That's right.

**Rep. Tr. p. 328, lines 5-11:**

Mr. Himmelsbach: At this time, Your Honor, we'll ask that People's Exhibit 3-A, 3-B and 3-C, which consist of checks Number 2430, 2431 and 2497, be received into evidence.

The Court: Very well, those three exhibits will now be admitted in evidence.

The Clerk: People's Exhibit 3-A, B and C, inclusive, admitted into evidence.

(Whereupon, the above-mentioned items, previously marked People's Exhibit 3-A, 3-B and 3-C for identification, were received in evidence.)

**Supreme Court of the United States**

No. **71-732** --- ~~October Term~~ **19** ~~71~~

**Marle R. Schmeskloth, Superintendent,  
California Conservation Center,**

**Petitioner**

**v.**

**Robert Clyde Bustamante**

ORDER ALLOWING CERTIORARI. Filed **February 28,** -----, **19 72**

The petition herein for a writ of certiorari to the United States Court of Appeals for the **Ninth** ----- Circuit is granted.